

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>IN RE: BPS DIRECT, LLC and CABELA'S, LLC, WIRETAPPING</b>	<b>MDL NO. 3074 2:23-md-03074-MAK</b>
--	---

**JOINT STATUS REPORT**

The parties, by and through undersigned counsel, having conferred pursuant to this Court's June 20, 2023 Order (Doc. 4) submit to the Court the following status report.

**I. Background**

Centralized before this Court are eight actions arising out of Defendants' use of session replay technology on its basspro.com and cabelas.com websites. Session replay software is an analytics tool employed on numerous websites, including major retailers located nationwide in part to monitor the functionality of their websites. It allows website owners to collect data on a user's visit to a website and, among other purposes, to see if a technical issue is interfering with a user's desired website access. For example, repeatedly clicking a button on a website may indicate that the button is not operating correctly and requires maintenance. A website owner can enable session replay by procuring and embedding JavaScript code, provided by a session replay provider, in the target website's operative code. The JavaScript code tracks specific browser and user events that occur on that website, such as mouse movements, clicks, scrolls, window resizing, and page loads. These discrete pieces of data are pieced together using session replay software by session replay providers to recreate a visual depiction of a user's website experience.

Plaintiffs are various individuals who filed cases as set forth in the attached Exhibit A. Plaintiffs seek to represent various federal and state classes, again set forth in Exhibit A.

Plaintiffs contend that Defendants' use of session replay code violates various wiretapping, consumer protection, and privacy statutes and common laws and invades their privacy. Plaintiffs contend that class certification is appropriate and that all class members are entitled to damages and injunctive relief. Defendants deny any such violations, deny that any private information is revealed, deny Plaintiffs have standing, argue that there was consent to session replay, deny Plaintiffs are damaged, and deny class certification is appropriate.

## **II. Procedural Posture**

Each of the eight cases centralized in this proceeding is at a similar procedural posture. Motions to dismiss are pending in the *Calvert*, *Cornell*, *Montecalvo* and *Hernandez* matters. Only the *Montecalvo* matter is fully briefed. Complaints are pending in the *Moore*, *Durham* and *Vonbergen* matters, to which Defendants have yet to respond. The parties had agreed to an extension of time for the *Tucker* plaintiff to file an amended complaint, consolidating the claims he asserted in two separately filed actions. Given the transfer of that action to this Court, an amended complaint has yet to be filed.

As discussed further herein, Plaintiffs intend to file a consolidated complaint to supersede all underlying and transferred complaints; as a result, no ripe motions are currently before the Court.

Defendants have filed corporate disclosure statements in all actions and in this Court. Plaintiffs have or will file diversity of citizenship statements as required by this Court by July 10, 2023. Doc. 15 at 3. No party has provided initial disclosures and no party has initiated discovery.

No party is aware of any tag-along matter that has not yet been transferred to this Court, nor is any party aware of any other related actions pending in state or federal court. A

conditional transfer order has been entered in *Irvin v. Cabela's LLC*, No. 23-530 (M.D. Pa.); however Plaintiff Irvin and Defendants have moved to vacate the CTO and are in agreement that the *Irvin* matter should be excluded from this proceeding. Undersigned Plaintiffs do not intend to file papers or take a position on that issue. Because *Irvin* is not presently before this Court, Plaintiff's counsel in *Irvin* did not participate in this status report and have not filed an appearance in this proceeding.

There have been no settlement discussions with regard to any claim or any case.

### **III. Stipulated Facts and Common Themes**

The parties agree at this time to the following stipulated facts:

- The use of session replay code on basspro.com and cabelas.com at certain times;
- The presence of privacy policies and terms of use on basspro.com and cabelas.com during at least some portions of the relevant time period;

All parties agree that the following common themes/issues are present:

- Whether Plaintiffs have standing;
- What information session replay code transmits, including whether the contents of communications are transmitted;
- Whether the transmission is contemporaneous;
- Whether session replay code is a device;
- Whether session replay code is a tracking device;
- Whether session replay code falls within the telephone exception and/or business extension exception;
- Whether the use of session replay code was knowing, intentional or willful, and/or whether its use was procured to intercept information;
- Whether session replay code providers use the data captured by session replay code;
- Whether a reasonable expectation of privacy exists based on the alleged conduct; and
- Whether Plaintiffs consented to the alleged transmission(s).

**IV. Availability of Counsel for Case Management Conference; Lead Counsel; Service**

The parties are available for an in-person case management conference on July 25, 2023 at 1:30 p.m. and would prefer that the Conference be scheduled at that time.

Undersigned Plaintiffs' counsel have agreed on interim lead and liaison counsel to prosecute the consolidated action. Plaintiffs agree that the following attorneys shall serve as interim co-lead counsel pursuant to Fed. R. Civ. P. 23(g): Kate Baxter-Kauf, Nicholas Colella, and Joseph Kanee, with Nicholas Colella also serving as liaison counsel. Plaintiffs further propose a steering committee of the following attorneys: Carey Alexander, MaryBeth Gibson, and Steven Nathan. Plaintiffs believe that this proposed appointment comports with the requirements of Fed. R. Civ. P. 23(g) and is consistent with this Court's description of policies to be considered in the appointment of counsel. *See* Doc. 4 at 5. Plaintiffs will provide resumes and/or formally move for appointment on or before July 11, 2023, as the Court prefers.

Defendants are represented by Jennifer McLoone and Erin (Loucks) Leffler, with the law firm of Shook, Hardy & Bacon. Defendants designate Ms. McLoone to serve as lead counsel. Defendants reserve the right for additional counsel to appear as the litigation may warrant.

The Parties agree to service by email exclusively, for any documents not filed via CM/ECF. The Parties agree that all service emails shall contain the following in the Subject Line – “SERVICE OF COURT DOCUMENT – CASE NO. MDL 3074”, and shall contain the following information in the body of the email:

Court:	United States District Court for the Eastern District of Pennsylvania
Case No.:	MDL 3704
Case Style:	<b>IN RE: BPS DIRECT, LLC and CABELA'S, LLC, WIRETAPPING</b>
Title of Document(s) Served:	1.
Serving Attorney's Name:	
Serving Attorney's Phone No.:	

The Parties agree that service of all documents shall be made on counsel via the email addresses counsel designate on Exhibit B, hereto, and agree to promptly update the list of designated counsel as appropriate by sending an email to the service list.

#### **V. Proposals for Case Management**

Plaintiffs intend to file a consolidated complaint that supersedes all currently pending and transferred complaints promptly after resolving the roles of Plaintiffs' counsel. Therefore, there is no need for a deadline for addressing imminent or pending dispositive motions on the pleadings. This also obviates the need to group Plaintiffs for purposes of pretrial management based on asserted state law claims, and Plaintiffs do not believe that additional lead Plaintiffs' counsel need be appointed for such groupings, or that appointment of a lead plaintiff is necessary. Defendants agree groupings are unnecessary at this time.

After the filing of a consolidated complaint, the parties agree that it is appropriate to set a briefing schedule for the motion to dismiss the consolidated complaint that Defendants intend to file. Defendants believe a threshold issue for adjudication is whether each Plaintiff has standing to proceed. The parties believe it most efficient to adjudicate all issues under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) in the same motion practice and respectfully request 30 additional pages for memoranda filed in support of, or in opposition to, the motion to dismiss, and Defendants respectfully request 15 additional pages for any reply brief to be filed.

The Parties agree to exchange initial disclosures, negotiate stipulations for a protective order and protocol for electronically stored information, coordinate on issues of preservation, and negotiate the need for potential third-party preservation subpoenas to ensure all necessary evidence is preserved while Defendants' motion to dismiss is pending. Plaintiffs do not believe any further stay of discovery is necessary. The parties have proposed deadlines for initial disclosures and core discovery deadlines in the proposed schedule below.

The parties believe that this Court's Policies and Procedures (May 2023) provide sufficient guidance for the conduct and resolution of discovery or scheduling disputes at this time and are prepared to discuss any additional dispute or scheduling matters at the Court's direction at the CMC. The parties do not believe that appointment of a Rule 53 master for either discovery or settlement is necessary at this time.

The parties propose the following initial deadlines and schedule, based on the foregoing proposal:

Event	Deadline	Approximate Date
<i>Deadline for Consolidated Complaint to be filed</i>	30 days following CMC or appointment of counsel, whichever is later	Approx. August 25, 2023
<i>Deadline for Defendants to file motion to dismiss</i>	30 days after the filing of the Consolidated Complaint	Approx. September 25, 2023
<i>Deadline for Plaintiffs to file response to motion to dismiss</i>	30 days after the filing of the motion to dismiss	Approx. October 25, 2023
<i>Deadline for Defendants to file reply in support of motion to dismiss</i>	21 days after the filing of the response to the motion to dismiss	Approx. November 29, 2023
<i>Motion to dismiss Hearing</i>	At the Court's discretion after briefing is completed	
<i>Parties to Exchange Initial Disclosures</i>	7 days after consolidated amended complaint is filed	Approx. September 1, 2023
<i>Close of Fact Discovery</i>	15 months after the ruling on the motion to dismiss	

Event	Deadline	Approximate Date
<i>Plaintiffs to move for Class Certification and serve certification-related expert reports</i>	18 months after the ruling on the motion to dismiss	
<i>Defendants to oppose Class Certification and serve certification-related expert reports</i>	90 days after the motion for class certification is filed	
<i>Plaintiffs to file Reply and any rebuttal expert reports in support of Class Certification</i>	45 days after the response to the motion for class certification is filed	
<i>Class Certification Hearing</i>	At the Court's discretion after briefing is completed	

Date: July 6, 2023

By: /s/ Kate M. Baxter-Kauf

Kate M. Baxter-Kauf

Karen Hanson Riebel

Maureen Kane Berg

**LOCKRIDGE GRINDAL NAUEN P.L.L.P.**

100 Washington Avenue South, Suite 2200

Minneapolis, MN 55401

Tel: (612) 339-6900

[kmbaxter-kauf@locklaw.com](mailto:kmbaxter-kauf@locklaw.com)

[khriebel@locklaw.com](mailto:khriebel@locklaw.com)

[mkberg@locklaw.com](mailto:mkberg@locklaw.com)

By: /s/ Nicholas A. Colella

Nicholas A. Colella (PA Bar # 332699)

Gary F. Lynch (PA Bar # 56887)

Kelly K. Iverson (PA Bar # 307175)

Jamisen Etzel (PA Bar # 311514)

Elizabeth Pollock-Avery (PA Bar # 314841)

Patrick Donathen (PA Bar # 330416)

**LYNCH CARPENTER, LLP**

1133 Penn Avenue, 5<sup>th</sup> Floor

Pittsburgh, PA 15222

Tel: (412) 322-9243

[NickC@lcllp.com](mailto:NickC@lcllp.com)

[Gary@lcllp.com](mailto:Gary@lcllp.com)

[Kelly@lcllp.com](mailto:Kelly@lcllp.com)

[Jamisen@lcllp.com](mailto:Jamisen@lcllp.com)

[Elizabeth@lcllp.com](mailto:Elizabeth@lcllp.com)

[Patrick@lcllp.com](mailto:Patrick@lcllp.com)

Katrina Carroll  
**LYNCH CARPENTER, LLP**  
111 W. Washington St. Suite 1240  
Chicago IL 60602  
Tel: (312) 750-1265  
[katrina@lcllp.com](mailto:katrina@lcllp.com)

By: /s/ Joseph H. Kanee  
Joseph H. Kanee  
**MARCUS & ZELMAN LLC**  
701 Brickell Avenue, Suite 1550  
Miami, FL 33131  
Tel: (786) 369-1122  
[joseph@marcuszelman.com](mailto:joseph@marcuszelman.com)

Ari H. Marcus (PA Bar # 322283)  
**MARCUS & ZELMAN LLC**  
701 Cookman Avenue, Suite 300  
Asbury Park, NJ 07712  
Tel: (732) 695-3282  
[ari@marcuszelman.com](mailto:ari@marcuszelman.com)  
*Proposed Plaintiffs' Co-Lead and Liaison Counsel*

By: /s/ Carey Alexander  
Carey Alexander  
**SCOTT & SCOTT, ATTORNEYS AT LAW,  
LLP**  
230 Park Avenue  
Ste 17th Floor  
New York, NY 10169  
Tel: (212) 223-6444  
[calexander@scott-scott.com](mailto:calexander@scott-scott.com)

By: /s/ MaryBeth V. Gibson  
MaryBeth V. Gibson  
**THE FINLEY FIRM, P.C.**  
3535 Piedmont Rd.  
Building 14, Suite 230  
Atlanta, GA 30305  
Tel: (404) 978-6971  
[mgibson@thefinleyfirm.com](mailto:mgibson@thefinleyfirm.com)

By: /s/ Steven M. Nathan

Steven M. Nathan

**HAUSFELD LLP**

33 Whitehall Street Fourteenth Floor

New York, NY 10004

Tel: (646) 357-1100

snathan@hausfeld.com

James J. Pizzirusso (Md. Bar No. 20817)

**HAUSFELD LLP**

888 16th Street N.W. Suite 300 Washington,

D.C. 20006

(202) 540-7200

jpizzirusso@hausfeld.com

*Proposed Plaintiffs' Steering Committee*

By: /s/ Bryan L. Bleichner

Bryan L. Bleichner

Philip J. Krzeski

**CHESTNUT CAMBRONNE PA**

100 Washington Avenue S, Suite 1700

Minneapolis, MN 55401

Telephone: (612) 339-7300

Fax: (612) 336-2940

bbleichner@chestnutcambronne.com

pkrzeski@chestnutcambronne.com

By: /s/ Tiffany Yiatras

Tiffany Marko Yiatras

**CONSUMER PROTECTION LEGAL, LLC**

308 Hutchinson Road

Ellisville, Missouri 63011-2029

Tel: (314) 541-0317

tiffany@consumerprotectionlegal.com

Francis J. "Casey" Flynn, Jr.

**LAW OFFICE OF FRANCIS J. FLYNN, JR.**

6057 Metropolitan Plaza

Los Angeles, CA 90036

Tel: (314) 662-2836

casey@lawofficeflynn.com

By: /s/ Jonathan Jagher

Jonathan M. Jagher (PA Bar # 204721)  
**FREED KANNER LONDON & MILLEN**  
**LLC**  
923 Fayette Street  
Conshohocken, PA 19428  
Tel: (610) 234.6486  
[jjagher@fklmlaw.com](mailto:jjagher@fklmlaw.com)

By: /s/ Daniel Shay

Daniel G. Shay  
**LAW OFFICE OF DANIEL G. SHAY**  
2221 Camino Del Rio South, Suite 308  
San Diego, CA 92108  
Tel: (866) 222-7429  
[DanielShay@TCPAFDCPA.com](mailto:DanielShay@TCPAFDCPA.com)

By: /s/ Gary M. Klinger

Gary M. Klinger  
**MILBERG COLEMAN BRYSON**  
**PHILLIPS GROSSMAN, PLLC**  
227 W. Monroe Street, Suite 2100  
Chicago, IL 60606  
Tel: (847) 208-4585  
[gklinger@milberg.com](mailto:gklinger@milberg.com)

By: /s/ Joshua Swigart

Joshua Brandon Swigart  
**SWIGART LAW GROUP, APC**  
2221 Camino Del Rio South, Suite 308  
San Diego, CA 92108  
Tel: (866) 219-8344  
[josh@swigartlawgroup.com](mailto:josh@swigartlawgroup.com)

By: /s/ Brian C. Gudmundson

Brian C. Gudmundson  
Rachel K. Tack  
**ZIMMERMAN REED, LLP**  
1100 IDS Center  
80 South 8th Street  
Minneapolis, MN 55402  
Tel: (612) 341-0400  
[Brian.Gudmundson@zimmreed.com](mailto:Brian.Gudmundson@zimmreed.com)  
[rachel.tack@zimmreed.com](mailto:rachel.tack@zimmreed.com)  
*Plaintiffs' Counsel*

-and-

By: s/Jennifer A. McLoone  
Jennifer McLoone  
**SHOOK, HARDY & BACON L.L.P.**  
201 South Biscayne Blvd., Suite 3200  
Miami, FL 33131  
Tel: 305-358-5171  
jmcloone@shb.com

Erin (Loucks) Leffler  
**SHOOK, HARDY & BACON L.L.P.**  
Two Commerce Square  
2001 Market Street, Suite 3000  
Philadelphia, PA 19103  
Telephone: (215) 278-2555  
leffler@shb.com

*Defense Counsel*